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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

HAROLD D. SMITH
Counsel for Petitioner
18th Floor, Home Federal Tower
1720 Harrison Street
Hollywood, Florida 33020
Telephone: (305) 923-6500

JAMES L. NEUSTADT
Assistant General Counsel
American Federation of Government Employees
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
Of Counsel

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OCTOBER TERM, 1979

NO.

AMERICAN FEDERATION OF
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Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

American Federation of Government Employees, the petitioner herein, prays that a writ of certiorari issue to review the order of the District Court of Appeal of Florida, Third District, entered in the above entitled case on January 23, 1979.

ORDER BELOW

The order of the District Court of Appeal of Florida, Third District, is unreported and is printed in Appendix, hereto, page App. 1.

JURISDICTION

The order of the District Court of Appeal of Florida, Third District, was entered on January 23, 1979. A timely petition for rehearing was denied on February 12, 1979 (C.R., page 37). Petitioner filed a timely notice to invoke the certiorari jurisdiction of the Supreme Court of Florida on March 1, 1979 (C.R., page 38). The Supreme Court of Florida denied certiorari and declined to take jurisdiction in its order entered on September 26, 1979 (C.R., page 39). The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

The effect of the order of the District Court of Appeal of Florida, Third District, in denying a writ of prohibition to defendant American Federation of Government Employees and the subsequent refusal of the Supreme Court of Florida to take jurisdiction to review said order, is to permit the state trial court to erroneously assert jurisdiction over the subject matter in this cause.

The U.S. Supreme Court has held that the denial of a writ of prohibition to prevent a lower court from taking jurisdiction of a controversy is final so as to subject the order to review by the U.S. Supreme Court although the original controversy is not determined. *Michigan Cent. R. Co. v. Mix, et al.*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed 470 (1929). In the Michigan Cent. case this Court held it had jurisdiction even though there was no opinion written by the highest court of the state in denying the application for writ of prohibition.

The federal question raised by defendant American Federation of Government Employees in the Florida court, and here, is whether the Florida courts have power to proceed with and determine the controversy or whether the subject matter is preempted by Executive Order 11491. See *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry, et al.* 371 U.S. 542, 83 S.Ct. 531, 535, 9 L.Ed.2d 514 (1963).

QUESTIONS PRESENTED

1. Can a member of a Federal Public Sector Labor Union sue the National Union in state court in a common law negligence action for the alleged failure of a national union representative to represent the union member in an adverse action proceeding regarding the union member's termination from employment with a federal employer.

2. The second and primary question presented to this Court is whether or not the Florida Supreme Court finally and erroneously asserted its jurisdiction to deal with a controversy which is beyond its power, and instead, is within the exclusive domain of the Assistant Secretary of Labor pursuant to Executive Order 11491.

3. The third question presented to this Court is whether the Florida court asserted its jurisdiction to deal with a controversy erroneously characterized as a common law tort action when in fact the proper characterization of the action is breach of duty of fair representation, calling for application of principles developed pursuant to federal labor law and Executive Order 11491, Sec. 10(e).

4. The fourth question presented to this Court is whether the Florida court erroneously asserted its jurisdiction to deal with the controversy in this cause, without first requiring plaintiff DeGrio to exhaust administrative remedies.

STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves Executive Order 11491 as amended by Executive Order 11616, 11636 and 11838, which was issued on October 29, 1969, pursuant to 5 USC 3301 and 7301. E.O. 11491 replaced E.O. 10988, which was issued by President John F. Kennedy on January 17, 1962. The sections this petition will be dealing with are set forth below (a copy of the Executive Order is included in the certified record page 43-49).

> Sec. 10(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor

> organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.
>
> Sec. 19(b) A labor organization shall not—
>
> (1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

STATEMENT OF THE CASE

The petitioner, American Federation of Government Employees, is one of the defendants in the state trial court. Defendant William Mudgett, a National Union Representative, was dismissed from the cause, with prejudice, by order entered November 22, 1978. The respondent is the circuit court judge presiding over the state trial court proceedings. The plaintiff in the state court proceedings is Joella DeGrio. Petitioner is represented by Attorney Harold D. Smith. The law firm of Nachwalter, Christie & Falk, P.A. represented the plaintiff below and respondent Judge Gale in the state appellate proceedings with reference to Defendant AFGE's petition for writ of prohibition. For simplicity the parties will be referred to as follows:

> Petitioner American Federation of Government Employees will be referred to as defendant AFGE.

William Mudgett, defendant below, will be referred to as defendant Mudgett.

Respondent, the Honorable John Gale, trial court judge, will be referred to as Judge Gale.

Joella DeGrio, plaintiff below, will be referred to as plaintiff DeGrio.

The following symbols will be used:

Tr Transcript
A. Appendix
C.R. Certified Record

This action was brought by plaintiff DeGrio on April 28, 1978, in the Eleventh Judicial Circuit in and for Dade County, Florida. An amended complaint was filed on September 19, 1978. Plaintiff DeGrio's amended complaint alleges, among other things, that defendant Mudgett, while acting within the course and scope of his duties as a national union representative of defendant AFGE, was negligent in his failure to attend and represent plaintiff DeGrio in an adverse action proceeding concerning plaintiff DeGrio's termination from her job with a federal employer. (See amended complaint, C.R., page 1-4) Defendant AFGE filed its motion to dismiss the amended complaint on September 29, 1978, alleging, among other things, that the state court lacked jurisdiction over the subject matter. (C.R., page 5-9) Defendant AFGE argued that if any duty at all was owed to plaintiff DeGrio, by defendant AFGE, it had to be a duty of fair representation. The duty of fair representation owed to its members, by unions created by executive order, is set

forth in Sec. 10(e) of E.O. 11491. (C.R., page 46) Defendant AFGE contended in the state court proceedings that Plaintiff DeGrio's allegations amounted to a charge that Defendant AFGE breached its duty of fair representation under E.O. 11491, thus, the subject matter was federally preempted and the state court must defer to the administrative procedure established pursuant to said executive order.

During a hearing on defendant AFGE's second motion to dismiss, Judge Gale characterized plaintiff DeGrio's action as being "a common law negligence action" and denied defendant AFGE's motion to dismiss. (Tr. p. 19 & 20, See excerpt included in C.R., page 17-18)

Defendant AFGE filed a petition for writ of prohibition in the District Court of Appeal of Florida, Third District, on November 27, 1978, seeking an order prohibiting the trial court from exercising jurisdiction over the subject matter in this cause. (C.R., page 19-30) Pursuant to said petition The District Court of Appeal issued a rule nisi on November 30, 1978, to show cause why a writ of prohibition should not be granted. (C.R., page 31-32) However, after hearing oral argument, the District Court issued its order on January 23, 1979 discharging the rule nisi and dismissing defendant AFGE's suggestion for writ of prohibition. (C.R., page 33 & App.) On February 12, 1979, the District Court denied defendant AFGE's petition for rehearing. (C.R., page 37) On March 1, 1979, defendant AFGE filed a timely petition with the Supreme Court of Florida to review the order of the District Court of Appeal dismissing the petition for writ of prohibition. (C.R., page 38) On September 26, 1979, the Supreme Court of Florida issued its order denying certiorari and declining

to take jurisdiction of the cause. (C.R., page 39) The effect of said order was to leave the state trial court with jurisdiction over the subject matter.

REASONS FOR GRANTING THE WRIT

This case involves the basic question of whether a union member can avoid application of the federal preemption doctrine and the exhaustion of administrative remedies doctrine by simply characterizing an action against the union as "common law negligence". Accordingly, important questions directly affecting federal labor law are presented.

To allow this cause to proceed in the state court under the label "common law negligence" would be to set a precedent in the labor law field not heretofore recognized. The court would be opening the door for every disgruntled union member to label his complaint as "common law negligence" and, thus, get directly into state court without exhausting administrative remedies and without being required to establish other elements necessary in an action for breach of duty of fair representation.

This Court said in *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963):

> It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather as stated in Garmon, supra, 359 U.S., at 246, 79 S.Ct. at 780, "(o)ur concern is with delimiting *areas of conduct* which must be free from state regulation if

> national policy is to be left unhampered" (Emphasis added). In the present case the conduct on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.

As noted earlier, any duty on defendant AFGE to represent plaintiff DeGrio in an adverse action, necessarily had to flow from Executive Order 11491. Sec. 10(e) of said order sets forth the union's duty of fair representation. Any allegations that the duty under Sec. 10(e) has been breached is an allegation that the Executive Order has been breached. This is an issue to be resolved by the Assistant Secretary of Labor. The Assistant Secretary of Labor and The Federal Labor Relations Council were created as the administrative experts for handling allegations that the Executive Order has been breached. An administrative procedure for considering such allegations was developed by the Assistant Secretary of Labor and set forth in 29 CFR 203, et.seq. Allegations that a union has breached its duty of fair representation have been processed through said administrative procedure on the question of whether the union's conduct constitutes an unfair labor practice in violation of Sec. 19(b)(1) of The Executive Order. The Assistant Secretary of Labor has considered and decided a number of cases involving issues of whether a union has breached its duty of fair representation. See the following decisions which are published, by the U.S. Department of Labor—Management Services Administration, in a bound publication entitled, "Decisions and Reports on Rules of

the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491 as Amended":

Anthan v. Professional Air Traffic Controllers Organization, MEBA, AFL-CIO (PATCO), A/SLMR 878 (1977).

Frealy v. American Federation of Government Employees, A/SLMR No. 838 (1977).

Quilico v. National Association of Government Employees, Local R7-51 (NAGE), A/SLMR No. 896 (1977).

Reynolds v. American Federation of Government Employees, Local 1858, Assistant Secretary Case No. 40-6700(CO), appealed to Federal Labor Relations Council and Reported at 4FLRC 466-469.

Wiest v. Professional Air Traffic Controller Organization, A/SLMR No. 918 (1977).

Willis and Wright v. National Association of Government Employees, Local R14-32 (NAGE), A/SLMR No. 469 (1974).

It should be noted that in considering issues involving breach of duty of fair representation, the administrative law judges have gone to great lengths to fashion their recommended decisions and orders after U.S. Supreme Court cases involving issues of breach of duty of fair representation. In the *Frealy v. AFGE* case (C.R., page 63), the administrative law judge said that under The Executive Order unions have a duty of

fair representation similar to that in the private sector. The administrative law judge relied upon private sector court decisions in evaluating the alleged breach of duty of fair representation. The same is true in the *Wiest v. PATCO* case. In the PATCO case the administrative law judge indicates that Sec. 10(e) of The Executive Order represents one of an employee's rights under The Order, and that Sec. 19(b)(1) of The Order mandates that a labor organization shall not interfere with, restrain or coerce an employee in the exercise of *his rights assured by The Order.* (Emphasis added). It is obvious from the administrative law judge's interpretation of The Order that a breach of a union's duty under Sec. 10(e), constitutes a breach of Sec. 19(b)(1), of The Executive Order, and the proper forum for resolving such an issue would be before The Assistant Secretary of Labor. This principle is further supported by *Willis and Wright v. National Association of Government Employees, Local R14-32 (NAGE),* A/SLMR No. 469 (1974).

The argument may be advanced by respondent that if this cause is characterized as involving defendant AFGE's duty of fair representation to plaintiff DeGrio, the state court would have jurisdiction to determine the controversy. This argument, if advanced, is not valid in this instance. Even though some state courts have taken jurisdiction in duty of fair representation-type controversies in private sector labor relations, this writer has not located any cases where a state court has taken jurisdiction in duty of fair representation-type controversies involving public sector unions. Assuming arguendo that the State of Florida could take jurisdiction over duty of fair representation controversies involving public sector labor unions,

plaintiff would still be required to exhaust administrative remedies or allege ultimate facts to show that it would be futile to attempt to exhaust administrative remedies. As can be seen from the complaint, plaintiff DeGrio never alleged that she exhausted or attempted to exhaust her administrative remedies pursuant to Executive Order 11491 or pursuant to the terms of the union's National Constitution (pertinent parts included in C.R., page 40-42, see Articles XIII and XIV).

The doctrine of exhaustion of administrative remedies and the preemption doctrine have been recognized and applied in the state of Florida. *Pushkin v. Lombard,* 279 So.2d 79 (Fla.3d DCA 1973). *Local Union #2135, International Association of Firefighters v. City of Ocala,* 371 So.2d 583 (Fla. 1st DCA 1979). *Maxwell v. School Board of Broward County,* 330 So.2d 177 (Fla. 4th DCA 1976) (copy included in C.R., page 50-54).

In the Maxwell case, a case involving a State Public Sector Union, the court held that jurisdiction over labor activities is preempted in favor of the Public Employee Relations Commission if the activities are arguably covered by provisions of the Florida Statutes Chapter establishing guidelines governing collective bargaining by public employees. Section 447.307 of The Florida Statutes establishes the duty of fair representation for state public sector labor unions, the same as Sec. 10(e) of E.O. 11491 establishes the duty of fair representation for federal public sector labor unions.

The Florida Public Employee Relations Commission has ruled that an allegation that a union has breached its duty of fair representation is an allegation that the union has committed an unfair labor

practice under Chapter 447 of the Florida Statutes. *J. M. Gow, Jr. v. American Federation of State, County and Municipal Employees, Local 1363,* 4 FPER 4168 (1978) (copy included in C.R., page 65-66), and *Robert Rockwell Turner v. Laborers' International Union of North America, Local #666, et al.,* 4 FPER 4180 (1978). In the Gow case PERC referred to private sector court cases in its consideration of whether there had been a breach of duty of fair representation on the part of the public sector union. In Gow, PERC stated:

> As in the private sector under the NLRA, any default in performance of the Section 447.307 duty constitutes infringement of Section 447.301 rights and is therefore enforceable as an unfair labor practice under the provisions of Sections 447.501 and .503.

In accordance with the Maxwell reasoning, any state public sector cases involving issues of duty of fair representation would be preempted in favor of The Public Employee Relations Commission in the state of Florida.

There is a striking similarity between the Florida Statute governing state public sector labor relations and E.O. 11491 governing federal public sector labor relations, both being created with the purpose and objective to provide an exclusive method for resolving labor matters within the public sector. The function of the Public Employee Relations Commission in Florida and the Federal Labor Relations Council and Assistant Secretary of Labor in the federal sector are very similar in handling controversies involving pubic sector labor unions. The failure of the state of Florida to apply the preemption doctrine to the controversy involving

plaintiff DeGrio in accordance with the principles the Florida Court sets forth in the Maxwell case is just the kind of inconsistency in labor law that this court intended to preclude with the preemption doctrine set forth in *San Diego Building Trades Council v. Garmon,* 359 U. S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Any allegations that there has been a breach of the union's duty set forth in Sec. 10(e) of E.O. 11491 would involve activities that are arguably covered by The Executive Order and, thus, would be preempted in favor of the Assistant Secretary of Labor-Management Relations.

The Florida Supreme Court in *Sheetmetal Workers' Int. Ass'n. Local Union No. 223 v. Florida Heat and Power, Inc.* 230 So.2d 154 (Fla. 1970) held:

> If case is arguably subject to jurisdiction of National Labor Relations Board, then state courts must divest themselves of jurisdiction in favor of the federal Board and when question of possible or arguable federal jurisdiction arises it is to be determined by the National Labor Relations Board.

At the very least the case sub judice raises a question of possible or arguable federal preemption by E.O. 11491. The state court must defer to the Assistant Secretary of Labor to make the initial determination whether the subject matter is covered by the administrative procedures established pursuant to The Executive Order.

Respondent may advance the argument that plaintiff DeGrio's situation should be an exception to the federal preemption doctrine. If respondent advances such an argument, it should be rejected on the basis the nature of plaintiff DeGrio's complaint does not fall into

the category of cases that this Court has excepted from the federal preemption doctrine. An action characterized as common law negligence has never been excepted from the federal preemption doctrine by this Court.

In the Garmon case, this Court stated that giving the NLRB primary jurisdiction over labor controversies would solve the problem of uniformity in labor decisions. Two exceptions to the preemption rule were set out in the decision. The first allowed states to regulate and intervene when the activity was merely a "peripheral concern" of the Act. The second exception involved conduct that touches interests so "deeply routed in local feeling and responsibility" that absent specific congressional direction it cannot be inferred that Congress intended to deprive the state of the power to act. In support of this exception the Court relied on cases that involved violent activity, such as mass picketing, threats and actions of physical violence. Because a state's interest in maintenance of domestic peace was not intended to be overridden by the NLRA, and because intervention by state authority may be the only way to safeguard people from coercion and from destruction of personal property, the Court held that the general preemption rule ought not to apply in such cases. Barker, *Constitutional Law—Labor Law—National Labor Relations Board—State Trespass Laws Not Preempted by the National Labor Relations Act,* 79 Wisconsin Law Review, p. 217.

In *Linn v. United Plant Guard Workers of America Local 114* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Court established an exception to the Garmon preemption doctrine in a defamation case

holding that when statements made during a union representation campaign were made with malice and caused injury to an individual, a libel action was not preempted by the NLRA. The Court found that the state had an overriding interest in protecting residents from malicious libel.

In 1977 this Court further expanded the local concern exception in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In the Farmer Case the Court held that a state court had jurisdiction to adjudicate a tort action brought by a union member against the union to recover damages for intentional infliction of emotional distress. This exception was aimed at protecting persons from malicious intentional torts. None of these cases suggested that the Garmon "primary jurisdiction rule" be disturbed. As a matter of fact, this Court reaffirmed the Garmon preemption rule in the Farmer decision and in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971).

This Court established a further exception to the federal preemption doctrine in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). The Sears case involved union picketing. In the Sears case a state court injunction against peaceful picketing was aimed solely at the location of the arguably protected or prohibited trespassery picketing. The Court focused on the fact that the issue the Board would have confronted, had Sears filed an unfair labor practice charge, was not the same issue confronting the state court. The court

said, "The Board would have focused on the objective of the picketing, thus, the reason for preemption of state regulation of arguably prohibited conduct, threat of interference with the Board's primary jurisdiction, was not present." The Court indicated the subject matter would have been preempted had the controversy presented to the state court been identical to that which could have been presented to the Labor Board. In plaintiff DeGrio's case the controversy would be identical and, thus, preempted under the Sears reasoning.

In his concurring opinion, in the Sears case, Justice Powell noted "the 'danger of violence' is inherent in many — though certainly not all — situations of sustained trespassory picketing." (See page 1765 and footnote page 1766.) There has been no indication in recent decisions that this Court intends to extend the Sears exception to the preemption doctrine beyond trespass cases. There certainly has been no indication the Court intends to extend the exception to actions characterized as common law negligence actions.

There are no compelling or "overriding" state interests involved in the activities described in plaintiff DeGrio's complaint. There are no circumstances alleged in the complaint to justify excepting the case from application of the federal preemption doctrine.

This writer did not locate any cases where a court has taken jurisdiction over breach of duty of fair representation controversies involving unions created pursuant to Presidential Executive Order. There are numerous reported decisions involving said unions where courts have declined to take subject matter

jurisdiction over a variety of controversies, on the basis it was never the intent of the President of the United States to create any role for the judiciary in the implementation of the labor relations policy for federal employees. *Stevens v. Carey, et al.,* 483 F.2d 188 (7th Cir. 1973); *Meisch v. U.S. Army,* 435 F.Supp 341 (D.C. Mo. 1977); *Local 1498, American Federation of Government Employees v. American Federation of Government Employees (AFL-CIO), et al.,* 522 F.2d 486, (3rd Cir. 1975).

Subject matter jurisdiction is basic to the state court's authority to go forward with this cause, it should be determined at the outset of the action.

The order this Court is requested to review is one that falls in that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellants' consideration be deferred until the whole case is adjudicated. *Local No. 438, Const. and General Laborers' Union, AFL-CIO v. Curry,* 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963); *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963). Determination of subject matter jurisdiction is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising plaintiff's cause of action.

In the event this Court declines to take jurisdiction pursuant to 28 USC, Sec. 1257 (3), it is respectfully requested that this Petition for Certiorari be treated as a motion for leave to file a petition for writ of prohibition to be issued pursuant to 28 USC, Sec. 1651, to prevent

the state court from usurping jurisdiction with which it is not vested.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD D. SMITH
Counsel for Petitioner
18th Floor, Home Federal Tower
1720 Harrison Street
Hollywood, Florida 33020
Telephone: (305) 923-6500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December ——, 1979, pursuant to Supreme Court Rule 33, three copies of the foregoing petition for Writ of Certiorari were mailed to George M. Nachwalter, Esquire, Nachwalter, Christie & Falk, P.A., Attorneys for Plaintiff below, Joello DeGrio and Attorneys for Respondent, The Honorable John Gale. A copy was also mailed to The Honorable John Gale, Circuit Judge of The Eleventh Judicial Circuit in and for Dade County, Florida, Dade County Courthouse, Miami, Florida.

HAROLD D. SMITH
Counsel for Petitioner

Appendix

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1979

TUESDAY, JANUARY 23, 1979

CASE NO. 78-2189
Circuit No. 78-6174

WILLIAM MUDGETT and THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
Petitioners,

vs.

THE HONORABLE JOHN GALE, as Circuit Court Judge for the Eleventh Judicial Circuit In and for Dade County, Florida
Respondent,

This matter having come on for hearing before the court after notice, on petitioners' suggestion for writ of prohibition and responses filed and the court having considered same, it is ordered that the rule nisi heretofore issued on November 30, 1978 is discharged and the suggestion for writ of prohibition is dismissed.

Respondents' motion to transfer is hereby denied.

A True Copy
ATTEST:

[Illegible]
Clerk District Court of
Appeal, Third District

cc: Jay M. Levy
Harold D. Smith
Richard P. Brinker
Hon. John Gale

/bc

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1979

MONDAY, FEBRUARY 12, 1979

CASE NO. 78-2189

WILLIAM MUDGETT, et al.,
Petitioners,

vs.

THE HONORABLE JOHN GALE, etc.,
Respondent.

Counsel for petitioners having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy
ATTEST:

/s/ [Illegible]
Clerk District Court of
Appeal, Third District

cc: Nyce & Smith
Jay M. Levy

/plc

SUPREME COURT OF FLORIDA
WEDNESDAY, SEPTEMBER 26, 1979

CASE NO. 56,292
District Court of Appeal, Third District
78-2189

WILLIAM MUDGETT, et al.,
Petitioners,

v.

JUDGE JOHN GALE, etc.,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d). ADKINS, Acting C.J., BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By: Debbie Causseaux
Deputy Clerk

TC
cc: Hon. Louis J. Spallone,
Clerk
Hon. John Gale, Judge
Hon. Richard P. Brinker,
Clerk

Harold D. Smith,
Esquire
Jay M. Levy, Esquire

FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

CASE NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

G. M. NACHWALTER, ESQUIRE
NACHWALTER, CHRISTIE & FALK, P.A.
Attorneys for Respondent
9445 Bird Road, 2nd floor
Miami, Florida 33165
Telephone: (305) 223-2391

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CASE NO. 79-995

AMERICAN FEDERATION OF
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THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

INTRODUCTION

Petition for Certiorari is sought to review a decision of the District Court of Appeal of Florida, Third District. The parties will be referred to as they appear before this Court. Real party in interest, JOELLA DEGRIO, Plaintiff in the trial court, will be referred to as "DEGRIO". Petitioner's Appendix will be referred to by the letter "A". Respondent's Appendix will be referred to by the letters "AA".

ORDER BELOW

Review is sought of an Order entered by the District Court of Appeal of Florida, Third District, which dismissed a suggestion for a preemptory Writ of Prohibition challenging the trial Court's jurisdiction over a negligence action brought by DEGRIO against Petitioner.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 USC, Sec. 1257(3). Respondent contends that the decision of the District Court of Appeal of Florida, Third District, is a decision of an intermediate State appellate Court and not the highest Court of the State in which a decision could be had.

STATUTES INVOLVED

There are no Statutes directly involved herein, since the gravamen of this suit is common law negligence and the case was brought in Florida State Court.

QUESTIONS PRESENTED

I

WHETHER CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEWED WAS NOT RENDERED BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

II

WHETHER CERTIORARI WILL NOT LIE IN THAT BOTH RESPONDENT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CORRECTLY HELD THAT THE GRAVAMEN OF THE PRESENT CASE IS COMMON LAW NEGLIGENCE AND THEREFORE COGNIZABLE IN A STATE COURT OF GENERAL JURISDICTION.

STATEMENT OF THE CASE

This cause was commenced in the Circuit Court of the Eleventh Judicial Circuit of Florida by the filing of a Complaint by Joella Degrio against Petitioner and William Mudgett.[1] Pursuant to the order of Court, an amended complaint was filed on September 19, 1978 (AA 1-6). In the Amended Complaint, DEGRIO was alleged to be a member of Petitioner union. Essentially,

[1]William Mudgett was dismissed as a party by the trial Court and is not a party to this appeal.

the Amended Complaint stated that Petitioner, by and through its agent Mudgett, who was acting within the course and scope of his employment, had failed to attend an administrative hearing concerning DEGRIO's termination from her job and that Mudgett had failed to write a letter to the Administrative Law Judge explaining his failure to attend, although such a letter was requested by the Administrative Law Judge. As a result of the negligence on the part of Petitioner, DEGRIO had been denied an oral hearing, had lost her job and had otherwise been damaged. DEGRIO alleged that Petitioner's actions (by and through its agent Mudgett) were in willful and wanton disregard of her rights. The complaint sought both compensatory and punitive damages.

Petitioner moved to dismiss the amended complaint (AA 7-13). The only grounds significant for purposes of this appellate proceeding were that the Court lacked jurisdiction over the subject matter and that DEGRIO had failed to exhaust her administrative remedies.[2] On November 22, 1978, the Respondent denied Petitioner's motion to dismiss, thereby holding that the trial Court had jurisdiction over the subject matter of this cause (AA 14-15). From this Order denying its motion to dismiss, Petitioner commenced the litany of appellate proceedings which have culminated in the present Petition for Writ of Certiorari.

[2]While the motion to dismiss raised a plethora of grounds, only subject matter jurisdiction (preemption) and exhaustion of administrative remedies were raised before the District Court of Appeal. Therefore, these are the only two grounds that can be considered here. *Home Insurance Co. v. Dick,* 281 US 397 (1930); *C.I.O. v. McAdory,* 325 US 472 (1945).

On November 27, 1978, Petitioner sought a Writ of Prohibition in the District Court of Appeal of Florida, Third District, to prevent Respondent from proceeding with this cause due to an alleged lack of subject matter jurisdiction. On November 30, 1978, the District Court issued a rule nisi directing Respondent to show cause why the writ should not be granted. On January 23, 1979, after reviewing the Briefs of the respective parties and hearing oral argument in this cause, the District Court discharged the rule nisi and dismissed the suggestion for Writ of Prohibition (A 1-2). Petitioner sought rehearing which was denied on February 12, 1979 (A 3).

Petitioner then sought certiorari to the Supreme Court of Florida, a discretionary writ, based upon direct conflict with other opinions. Fla.R.App.Pro. 9.030(1)(A) states:

> "The Supreme Court of Florida shall review by appeal:
>
> (i) . . .
>
> (ii) final orders of trial Courts and decisions of District Courts of Appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."

Petitioner did not appeal as a matter of right from the District Court of Appeal, Third District, to the Supreme Court of Florida. It filed a petition for certiorari based

upon decisional conflict. The Supreme Court found no decisional conflict and denied the petition for certiorari. (A 4). The Supreme Court of Florida never assumed jurisdiction over this cause.

Eleven months after the District Court rendered its decision, Petitioner sought review by this Court.

ARGUMENT

I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEWED WAS NOT RENDERED BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

28 USC Sec. 1257 vests jurisdiction in the Supreme Court of the United States to review by certiorari:

> "Final judgments rendered by the highest Court of a state in which a decision could be had . . ."

28 USC Sec. 2101 requires a petition for writ of certiorari to be filed within 90 days of the judgment of that Court.

Florida's highest Court is the Supreme Court of Florida, to which, in cases where the Federal Constitution is construed, an appeal is afforded as a

matter of right.[3] The Supreme Court of Florida also has discretionary jurisdiction to review by certiorari cases involving decisional conflicts. This Court has, by 28 USC Sec. 1257, jurisdiction to review by certiorari decisions of the highest Court of a state:

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commissions held or authority exercised under the United States".

The highest Court of Florida, in this instance, is the Supreme Court of Florida.

Petitioner did not appeal to the Florida Supreme Court. It sought discretionary certiorari based upon decisional conflict. The Supreme Court of Florida held it had no jurisdiction to review by certiorari since there was no decisional conflict (A 4). Under Florida Practice, an appeal improvidently taken may be treated as a petition for certiorari, but a petition for certiorari improvidently taken may not be treated as an appeal. *Bartow Growers Proc. Corp. v. Florida Growers Proc. Coop.*, 71 So.2d 165 (Fla. 1954).

Not having appealed to the Supreme Court of Florida, the highest Court of that state, Petitioner cannot here obtain certiorari to review the decision of an intermediate state Court.

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[3]Fla. Const. Art. V Sec. (3)(b)(1):

> The Supreme Court shall hear appeals from . . . decisions of District Courts of Appeal . . . construing a provision of a state or federal constitution.

The argument raised by Petitioner both below and in this Court is that DEGRIO'S cause of action for negligence on the part of Petitioner has been preempted by Federal Law, specifically the duty of fair representation. Preemption is a doctrine based upon Article VI, Clause 2, of the United States Constitution commonly referred to as the Supremacy Clause. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824). In order for the District Court of Appeal to rule on the preemption argument, it necessarily had to construe the Supremacy Clause of the United States Constitution. Therefore, Petitioner failed to exhaust its appellate remedies within the State of Florida by failing to file an appeal to the Florida Supreme Court.

In *Matthews v. Huwe,* 269 U.S. 262 (1956), review was afforded to the Supreme Court of Ohio by both writ of error and writ of certiorari. Petitioner there filed for writ of error which was denied but did not file a petition for writ of certiorari. This Court held that Petitioner had failed to exhaust all of its remedies for review by the Supreme Court of Ohio and declined to exercise jurisdiction. See also, *Gorman v. Washington University,* 316 U.S. 98 (1942); *Gotthilf v. Sills,* 375 U.S. 79 (1964). Here Petitioner did not appeal to the Supreme Court of Florida from the decision of the District Court of Appeal, Third District. It had, under Florida Law, a right of appeal to the Supreme Court of Florida since the District Court of Appeal had to construe the United States Constitution in determining the preemption question. It failed to exercise that right.

Certiorari will not lie.

II

CERTIORARI WILL NOT LIE IN THAT BOTH RESPONDENT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CORRECTLY HELD THAT THE GRAVAMEN OF THE PRESENT CASE IS COMMON LAW NEGLIGENCE AND THEREFORE COGNIZABLE IN A STATE COURT OF GENERAL JURISDICTION.

The present case concerns no new issues not previously decided by this Court in other cases. There exists no important federal question presented in this case. There is no indication in the record of any reason, compelling or otherwise, why this ordinary case should be subject to this Court's full scrutiny. The decisions of the lower Court were correct and no federal issue of any significance is presented by this cause that has not been decided previously. A writ of certiorari will not lie in this situation.

A

Petitioner assumes that the complaint merely contains the label of negligence but that the allegations amount to nothing more than an action for breach of the duty of fair representation. The two Florida courts that have considered the merits of this cause have held that the complaint does state a cause of action in negligence and is not a "wolf in sheep's clothing". Contrary to Petitioner's contention, the complaint is for common law negligence and nothing more. Therefore, the State Court correctly held that it does have subject matter

jurisdiction, and no error has been shown by the Petitioner in this matter, let alone an error worthy of review by this Honorable Court.

The duty of fair representation was recognized by this Court in *Vaca v. Sipes,* 386 U.S. 171 (1967). In *Vaca,* this Court stated:

> "A breach of the duty of fair representation occurs only when a union's conduct *toward a member of the collective bargaining unit* is arbitrary, discriminatory or in bad faith".
>
> 386 U.S. at 190
> (emphasis added)

The duty of fair representation arises only to members of the collective bargaining unit. *Steele v. Louisville and N.R. Co.;* 323 U.S. 197 (1944); *Humphrey v. Moore,* 375 U.S. 335 (1964).

This Court must remember that review is sought based only upon the allegations of the Amended Complaint. The rule in Florida is that in resolving the subject matter jurisdiction question, the Court may look at the face of the Complaint, affidavits submitted in support of the motion, and matters capable of judicial notice. *Viking Superior Corp. v. W.T. Grant Co.,* 212 So.2d 331 (Fla. 1DCA 1968). No affidavit was supplied by Petitioner in support of its motion to dismiss. Therefore, this Court can only consider the well pleaded allegations of the Complaint and matters capable of judicial notice in reaching its decision in this cause.

Significantly, the Complaint does not allege that DEGRIO is a member of the collective bargaining unit, but merely states that DEGRIO was a member of the union. It is elementary that no duty of fair representation is owed to one not a member of the collective bargaining unit. *Vaca v. Sipes, supra.; Humphrey v. Moore, supra.* Based upon the allegations contained in the Amended Complaint, this cause does not involve the duty of fair representation since DEGRIO has not alleged that she is within the collective bargaining unit. Therefore, contrary to Petitioner's lengthy argument, this cause does not even involve the duty of fair representation.

Petitioner places great reliance in Sec. 10(e) of Exec. Order 11491, which sets forth a union's duty of fair representation in the public sector. By its very terms, Sec. 10(e) states that the duty arises "when a labor organization has been accorded exclusive recognition". Thus, the basis of the duty of fair representation under Sec. 10(e) of the Executive Order is the same as specified by the Courts in *Vaca v. Sipes, supra.* and *Humphrey v. Moore, supra.* Since the duty was judicially created, Petitioner's argument that any duty of fair representation flows exclusively from the Executive Order must be carefully scrutinized. Clearly, the duty of fair representation flows from the union's position as the employees' exclusive bargaining representative, and not from the obligations established in Sec. 10(e) of the Executive Order. It would exist even absent the Executive Order by virtue of the exclusive bargaining position of the union. Therefore, based upon the allegations of the Complaint, and the settled case precedents of this Court, no duty of fair representation is

owed in the present case since there is no allegation in the Complaint that DEGRIO was within the bargaining unit represented by the Petitioner, and the Petitioner's position is patently without merit.[4] This cause presents no substantial federal question to be decided by this Court. Certiorari will not lie under these circumstances.

B

Assuming arguendo that the present case involves not common law negligence but the duty of fair representation, the established precedents of this Court indicate that the present case is not preempted. Preemption applies only when an activity is arguable subject to Section 7 or 8 of the National Labor Relations Act. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). This Court has recently reexamined preemption in *Sears Roebuck and Co. v. San Diego Building Trades Council of Carpenters,* 436 U.S. 180 (1978). In its Opinion, this Court stated with regard to preemption:

> "The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to State

[4]Petitioner maintains that any duty of Petitioner to represent DEGRIO in adverse actions arose solely out of Executive Order. This is patently incorrect. DEGRIO was alleged in the Amended Complaint to be a union member. A contractual relationship between DEGRIO and the Petitioner/Union is sufficient to substantiate a duty between the Petitioner and DEGRIO.

> Court is identical to or different from that which could have been, but was not presented to the Labor Board."
>
> *Id.* at 197

The Petitioner is not within the jurisdiction of the National Labor Relations Board but is within the jurisdiction of the Assistant Secretary of Labor, the administrative arm of the Federal government responsible for enforcing Executive Order 11491. Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158) resembles Section 19 of Exec. Order 11491. Therefore, the preemption rationale of *Garmon* and *Sears, Roebuck and Co.* applies with equal force to Court actions brought against unions organized under Exec. Order 11491.

The present suit seeks *damages* for the negligence of the union in failing to represent DEGRIO at an administrative proceeding concerning her termination with the Federal government. This is not a remedy available from the Undersecretary of Labor and therefore little risk of interference with the regulatory jurisdiction of the Assistant Secretary of Labor exists. The controversy involved in a breach of duty of fair representation is whether the exclusive bargaining representative has failed in his duty to represent all members of the union fairly and has handled grievances in an arbitrary or perfunctory manner. See, *Vaca v. Sipes, supra.; Ruzicka v. General Motors,* 512 F.2d 306 (6th Cir. 1975). A cause of action in negligence and a cause of action for breach of the duty of fair representation are not similar. There is no danger that

the State Court's exercise of jurisdiction necessarily involves a risk of interference with the jurisdiction of the Assistant Secretary of Labor. Therefore, under *Sears Roebuck and Co. v. San Diego Council of Carpenters, supra,* there does not exist a basis to sustain the preemption argument in this case. This cause does not present any preemption arguments or facts that have not been previously decided by this Court. No basis for certiorari exists in this matter. Certiorari should be denied.

C

Assuming that this is a case involving breach of the duty of fair representation, law suits for the breach of the duty of fair representation are judicially cognizable. In *Vaca v. Sipes,* 386 U.S. 171 (1967), this Court held that the duty of fair representation was a judicial exception to the doctrine of preemption. In *Amalgamated Association of Motor Coach Employees v. Lockridge,* 403 U.S. 274, 301 (1971) this Court held:

> "The duty of fair representation was judicially evolved without the participation of the NRLB, to enforce fully the important principle that no individual union member may suffer invidious hostile treatment at the hands of the majority of his co-workers . . ."

It is well settled that State Courts have jurisdiction to determine cases concerning violations of the duty of fair

representation.[5] Thus, the Circuit Court of the Eleventh Judicial Circuit of Florida, as a court of general jurisdiction, has the power to decide cases involving the duty of fair representation. Since the Amended Complaint seeks damages in excess of $2,500, the Circuit Court has jurisdiction to hear this case.

Petitioner implies that a different rule is necessary since the Petitioner is a public sector union. Respondent's position is that the Assistant Secretary of Labor is juxtaposed in place of the National Labor Relations Board in the public labor union field. In *Old Dominion Branch, #496 v. Austin,* 418 U.S. 261 (1974), this Court was concerned with a civil action brought against a union created under Exec. Order 11491. This Court noted in *Old Dominion* that the provisions of the Executive Order established a labor management system for Federal employees similar to the scheme of the National Labor Relations Act. Thus, if this Court's holding in *Vaca* is that fair representation cases are not within the exclusive jurisdiction of the National Labor Relations Board and therefore not preempted, the same logic should apply to fair representation cases under Exec. Order 11491.

---

[5]*Bebensee v. Ross Pierce Electric Corp.,* 400 Mich. 233, 253 N.W.2d 633 (1977); *Wheeler v. International Woodworkers of America,* 274 Ore. 373, 547 P.2d 106 (1976) (en bank); *Anderson v. Amback Industries,* 48 A.D.2d 845, 369 N.Y.S.2d 170 (1975), *aff.* 40 N.Y.2d 865, 356 N.E.2d 478 (1976); *Magallanes v. Local 300 Laborers International,* 400 Cal.App.3rd 809, 115 Cal. R. 428 (2nd Dist. 1974), *cert. denied,* 419 U.S. 1121 (1975); *Plant v. Catalytic Const. Co.,* 287 A.2d 682 (Del.Sup.Ct.) *aff.,* 297 A.2d 337 (Del. 1972).

The duty of fair representation was judicially created and is judicially cognizable. The Circuit Court is a court of general jurisdiction and may hear a case involving a breach of duty of fair representation since these cases are not preempted. Therefore, assuming but not conceding that DEGRIO has stated a cause of action for breach of duty of fair representation, the Circuit Court has jurisdiction to hear this claim.

D

The Complaint alleged only simple negligence. Simple negligence for violating the tort standard of due care does not amount to a breach of the duty of fair representation. *Robesky v. Kantas Empire Airlines, Ltd.*, 573 F.2d 1082, 1084 (9th Cir. 1978). The actions are separate and apart and common law negligence is not preempted by the duty of fair representation.

E

Petitioner has raised questions concerning failure to exhaust administrative remedies. No suggestion is made that there is any unique issue concerning exhaustion of administrative remedies for this Court to decide. There is no substantial Federal question presented with regard to exhaustion of administrative remedies. There is no basis for this Court to issue a Writ of Certiorari in this matter.

CONCLUSION

No important questions directly affecting Federal Labor Law are presented. No important constitutional questions are raised. There is not even the slightest indication in the Petition for Writ of Certiorari that the lower Courts have decided this cause in a manner that is not consistent with previous decisions of this Court. Petition for Writ of Certiorari ought be denied.

Respectfully submitted,

G. M. NACHWALTER,
ESQUIRE
JAY M. LEVY, ESQUIRE
NACHWALTER, CHRISTIE &
FALK, P.A.
Attorneys for Respondent
9445 Bird Road, 2nd floor
Miami, Florida 33165
Telephone: (305) 223-2891

G. M. NACHWALTER

JAY M. LEVY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 1980, pursuant to Supreme Court Rule 33, three copies of the foregoing Respondent's Brief on Jurisdiction were mailed to Harold D. Smith, Esquire, Attorney for Petitioner, 18th floor, Home Federal Tower, 1720 Harrison Street, Hollywood, Florida 33020; three copies to James L. Neustadt, Esquire, Assistant General Counsel for Petitioner, American Federation of Government Employees, 1325 Massachusetts Avenue, N.W., Washington, D.C. 20005; and one copy to the Honorable John Gale, Circuit Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, Dade County Courthouse, Miami, Florida.

G. M. NACHWALTER
Attorney for Respondent

Appendix

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 78-6174

JOELLA DeGRIO,

Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Defendants.

FIRST AMENDED COMPLAINT

Plaintiff, JOELLA DeGRIO, sues the Defendants, WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, and alleges as follows:

COUNT I

1. This is an action that exceeds Two Thousand Five Hundred Dollars ($2,500) exclusive of interest and costs.

2. Plaintiff, JOELLA DeGRIO, is sui juris and a resident of Dade County, Florida.

3. Defendant, WILLIAM MUDGETT, is sui juris and a resident of Palm Beach County, Florida. Defendant, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, is an unincorporated labor union with its offices located in Washington, D.C. and members residing in Dade County, Florida. The AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES will hereafter be referred to as a National Union.

4. At all times material to this Complaint, Defendant MUDGETT was employed by the Defendant National Union as the National Representative. At all times material to this Complaint, Defendant MUDGETT acted both individually and within the course or scope of his employment with Defendant National Union.

5. At all times material to this Complaint, Plaintiff, JOELLA DeGRIO, was a member of the National Union and a member of Local 2447 of said National Union.

6. On or about September 9, 1976, Plaintiff, JOELLA DeGRIO was involved in an administrative proceeding concerning her termination as a federal employee based upon certain charges made by her employer. The proceedings were brought pursuant to the applicable rules and regulations appearing in the Code of Federal Regulations. The administrative hearing was to have taken place in Dade County, Florida.

7. On or about July 10, 1976, the Plaintiff either directly or indirectly informed the Defendant

MUDGETT that he was to represent the Plaintiff in the aforesaid administrative proceeding that was to take place in Dade County, Florida.

8. That the Defendant MUDGETT agreed to represent the Plaintiff at the administrative proceedings and had knowledge of the date and time that said proceeding was to commence. Such representation was within the course and scope of MUDGETT's duties as National Representative of the Union.

9. Defendant MUDGETT was notified of the date, place and time of the meeting by the Plaintiff or her agent and by the hearing examiner.

10. Despite good and sufficient notification, Defendant MUDGETT failed, refused or otherwise neglected to attend such hearing in Dade County, Florida. The Plaintiff refused to proceed with the hearing without the Defendant being present as her representative. As a result thereof, the Plaintiff was denied any and all representation in the administrative proceeding.

11. As a direct and proximate result thereof, Plaintiff, terminated as a Federal Employee, suffered emotional and physical stress which required hospitalization for which Plaintiff incurred medical expense, her working ability was impaired, her injuiries are either permanent or continuing in nature and she will suffer losses in impairment in the future.

WHEREFORE, Plaintiff demands:

a. Judgment for damages against the Defendants.

b. The costs of this action.

c. Such other and further relief as this Court may deem mete and proper.

COUNT II

12. Plaintiff, JOELLA DeGRIO, reaffirms and realleges paragraphs 1 through 11 of Count I as if fully set out herein.

13. Defendant MUDGETT was required by the Hearing Examiner to submit a letter explaining the reason why he failed to attend Plaintiff's administrative proceeding before the Hearing Examiner would grant Plaintiff her oral hearing on her termination.

14. Defendant MUDGETT failed, refused and neglected to send a letter described above and as a result of this failure, Plaintiff was denied representation and did not receive a hearing in this matter.

15. As a result of the negligence of Defendant MUDGETT, acting individually and as a representative of the Defendant National Union, Plaintiff has been damaged.

WHEREFORE, Plaintiff demands:

a. Judgment for damages against the Defendants.

b. The costs of this Action.

c. Such other and further relief as this Court may deem mete and proper.

COUNT III

16. Plaintiff realleges paragraphs 1 through 11 of Count I and paragraphs 12 through 15 of Count II as if fully set out herein.

17. Defendant MUDGETT, by virtue of his union position as National Representative and as Plaintiff's designated representative at the administrative hearing before the Hearing Examiner, owed to the Plaintiff a fiduciary duty.

18. The failure of the Defendant MUDGETT to appear at the Plaintiff's hearing/or to write the letter explaining his failure to appear, indicates a willful and wanton disregard for the rights of the Plaintiff.

WHEREFORE, Plaintiff demands:

a. Judgment for punitive damages against the Defendants.

b. The costs of this action.

c. Such other and further relief as this Court may deem mete and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing First Amended Complaint was mailed this 19th day of September, 1978 to: Mr. Harold D. Smith, 2131 Hollywood Boulevard, Suite 507, Hollywood, Florida, Attorney for Defendant.

NACHWALTER, CHRISTIE & FALK, P.A.
Attorneys for Plaintiff
9445 Bird Road
Miami, Florida 33165
Phone: 223-2391

By: /s/ JAY M. LEVY
JAY M. LEVY

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 78-6174

GENERAL JURISDICTION DIVISION

JOELLA DeGRIO,
Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
Defendant.

SECOND MOTION TO DISMISS

COMES NOW the Defendants, WILLIAM MUDGETT and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (hereinafter referred to as NATIONAL UNION), and file their Second Motion to Dismiss the above styled action and as grounds therefore states as follows:

1. On April 28, 1978, the original complaint in the above styled cause was served on defendant William Mudgett in his individual capacity.

2. On May 18, 1978, defendants served their initial Motion to Dismiss and accompanying Memorandum of Law.

3. On June 29, 1978, a copy of the original complaint was served on Defendant American Federation of Government Employees, by serving William Mudgett as Business Agent.

4. On July 17, 1978, Defendants reaffirmed and realleged all of the paragraphs on the initial Motion to Dismiss to apply with the same force to the Summons and Complaint served on June 29, 1978.

5. On August 24, 1978, Defendants' initial Motion to Dismiss was heard by this Honorable Court.

6. On September 14, 1978, by Order Nunc Pro Tunc, to August 31, this Court granted Defendant's Motion to Dismiss as to defendant Mudgett with Plaintiff being granted twenty (20) days leave to file an amended complaint. This court further reserved ruling on Defendant's Motion to Dismiss as to AFGE.

7. On September 19, 1978, Plaintiff served her First Amended Complaint.

8. This Second Motion to Dismiss will follow the same format as the initial Motion to Dismiss.

9. That with respect to Counts I, II, and III:

a. This Court lacks jurisdiction over the subject matter.

b. Plaintiff has failed to cite a Statute on which this cause is based.

c. Plaintiff has failed to allege that she has exhaused internal union procedures and administrative remedies required by 29 CFR, Section 204.2(a)(4).

d. This Court lacks personal jurisdiction over Defendant Mudgett, in his representative capacity as a National Union Representative.

e. This Complaint should be dismissed as to Defendant Mudgett individually because the wrongs allegedly committed by Defendant Mudgett are all with reference to his capacity as a national representative of the Defendant National Union.

f. Plaintiff has failed to join indispensable parties as party defendants in that if any duty was owed to the Plaintiff, it must necessarily flow from American Federation of Government Employees (AFL-CIO), Local 2447, and its former officers who held office at the time the alleged wrong occurred.

g. Plaintiff has failed to state a cause of action upon which relief can be granted in that the facts pleaded are insufficient to establish that a legal duty was owed to Plaintiff by Defendant Mudgett, individually, or in his representative capacity, or by Defendant National Union.

h. Plaintiff has failed to state a cause of action upon which relief can be granted in that the facts pleaded are insufficient to show that a legal wrong has been committed or that Defendant Mudgett,

individually, or in his representative capacity, or Defendant National Union have committed a legal wrong.

i. Plaintiff has failed to state a cause of action upon which relief can be granted in that Plaintiff has failed to plead facts to show what administrative proceeding is involved in her complaint even after the Court instructed Counsel for Plaintiff during the hearing on August 24, 1978, that "the complaint should be dressed up somewhat so we can know what kind of hearing we are talking about." Tr. 10

j. Plaintiff has failed to state a cause of action upon which relief can be granted in that she has failed to make a showing of how and to what extent she has sustained damages as a result of the conduct of Defendant Mudgett or Defendant National Union.

k. This Complaint fails to state a cause of action, because of inconsistent allegations that Defendant Mudgett acted both individually, and within the course or scope of his employment with Defendant National Union.

l. Assuming that Plaintiff has stated a cause of action upon which relief can be granted in any one of the Counts, the alleged cause of action stated therein is barred by the applicable doctrine of laches.

10. That with respect to Count I:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure to support the allegations that at all times material to the Complaint, the Plaintiff was a member of the National Union, and that a duty was owed to Plaintiff by Defendant Mudgett as an individual or in his representative capacity, and by Defendant National Union.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 8, that Defendant Mudgett had a duty to represent Plaintiff in an administrative proceeding.

11. That with respect to Count II:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach any documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure, to support the allegations set forth in paragraph 13, of said Complaint.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 15, that Defendant Mudgett was negligent.

d. Plaintiff has failed to allege that there is proximate cause between Defendant Mudgett's alleged conduct and Plaintiff's alleged injuries.

12. That with respect to Count III:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach any documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure to support the allegations set forth in paragraph 17, that Defendant Mudgett was designated to represent Plaintiff in any administrative proceeding and that Defendant Mudgett owed a fiduciary duty to Plaintiff.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 17, that Defendant Mudgett owed a fiduciary duty to the Plaintiff.

d. Plaintiff has failed to state with particularity, the circumstances surrounding the alleged conduct of Defendant Mudgett, that would justify an award of punitive damages.

13. Defendants' Memorandum of Law in support of this Second Motion to Dismiss is attached hereto and marked Exhibit A.

WHEREFORE, Defendants pray that this action will be dismissed with prejudice and that Defendants will be awarded a reasonable sum for attorney's fees, and the cost of defending this action.

I HEREBY CERTIFY that a copy of the foregoing Second Motion to Dismiss and accompanying Memorandum of Law was delivered to JAY M. LEVY, ESQUIRE, NACHWALTER, CHRISTIE & FALK, P.A., attorneys for Plaintiff, 9445 Bird Road, Miami, Florida 33165, this 29th day of September, 1978.

/s/ HAROLD D. SMITH
HAROLD D. SMITH
Attorney for Defendants
2131 Hollywood Blvd., Suite 507
Hollywood, Florida 33020
921-0704

NOV 30 1978

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 78-6174 CA (07)

GENERAL JURISDICTION DIVISION

JOELLA DEGRIO,

Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Defendants,

ORDER ON DEFENDANTS' SECOND MOTION TO DISMISS

THIS CAUSE came on to be heard upon Defendants' Second Motion to Dismiss Plaintiff's First Amended Complaint and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that the Motion To Dismiss of Defendant, WILLIAM MUDGETT, is hereby granted with prejudice, it is further

ORDERED and ADJUDGED that the Motion To Dismiss of Defendant, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES is hereby denied, and said Defendant shall have twenty (20) days from the date of this Order within which to file its Answer.

DONE and ORDERED in Chambers at Miami, Dade County, Florida this 22nd day of November, 1978.

JOHN GALE
JUDGE CIRCUIT COURT

Copies Furnished to:

NACHWALTER, CHRISTIE & FALK, P.A.
HAROLD D. SMITH, ESQ.

in the

Supreme Court

of the

United States

Supreme Court, U. S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1979

CASE NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

PETITIONERS' REPLY BRIEF ON JURISDICTION

HAROLD D. SMITH, ESQUIRE
Counsel for Petitioner
18th Floor Home Federal Tower
1720 Harrison Street
Hollywood, Florida 33020
Telephone: (305) 923-6500

JAMES L. NEUSTADT
Assistant General Counsel
American Federation of Government Employees
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
Of Counsel

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OCTOBER TERM, 1979

CASE NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

PETITIONERS' REPLY BRIEF ON JURISDICTION

American Federation of Government Employees, the Petitioner herein, files this its reply brief on jurisdiction.

ARGUMENT

Respondent Judge Gale, in his Brief on Jurisdiction, contends that Petitioner (defendant AFGE) had a right of appeal to the Supreme Court of Florida and that instead of appealing, discretionary certiorari was sought based upon decisional conflict. The implication is that the Supreme Court of Florida would have been required to take jurisdiction of this cause if the notice had been labelled "Appeal" instead of "Petition for Writ of Certiorari." Thus, it is argued that by not exercising its "right of appeal," Petitioner (defendant AFGE) failed to exhaust the state appellate remedies.

The reasoning of Respondent Judge Gale is not supported by case law or statute. The 1954 Bartow case he cites as authority, has been specifically superseded by Rule 9.040 (b) & (c) of the Florida Rules of Appellate Procedure. Pursuant to Rule 9.040 it is clear that if the proper label should have been "Appeal" instead of "Petition for Writ of Certiorari" the Supreme Court of Florida would have treated the Petition as a notice of appeal and taken jurisdiction accordingly. West's F.S.A. Vol. 32 Rules of App. Proc., Rule 9.040 (b) & (c) (1979 Special Pamphlet).

The above rule was among the 1977 revisions to the Appellate Rules which were adopted by the Supreme Court of Florida on October 27, 1977 to be effective March 1, 1978, *In re Proposed Florida Appellate Rules* 351 So.2d 981 (Fla. 1977). The committee notes to Rule 9.040 (b) & (c) state in part: "Under this rule, a Petition for a Writ of Certiorari should be treated as a Notice of Appeal, if timely." The committee further stated:

> This rule is intended to supersede Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969), where a petition for a common law writ of certiorari was dismissed by the District Court of Appeal because review was properly by appeal to the appropriate circuit court, and Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959), where a petition for a writ of certiorari was dismissed because review should have been by appeal.

The Engel case cited *Bartow Growers Proc. Corp. v. Florida Growers Proc. Coop.*, 71 So.2d 165 (Fla. 1954) as authority. It should also be noted that Respondent Judge Gale never advanced the "right of appeal" argument to the Supreme Court of Florida (See jurisdictional brief C.R. 67-77).

However, he did advance a similar argument in the District Court of Appeal of Florida, Third District, by a Motion to Transfer the cause to the Supreme Court of Florida (C.R. 78-81). The District Court of Appeal properly denied the Motion to Transfer (C.R. 86). No attempt thereafter was made to raise the "right of appeal" argument to the Supreme Court of Florida. If said argument would have been raised, the Supreme Court of Florida would have simply treated the Petition for Writ of Certiorari as an appeal, or on the strength of Florida case law, the court no doubt would have concluded that there was no "right of appeal."

Regarding a question of "right of appeal," the Supreme Court of Florida has explained what is meant by a construing of the Constitution. *In Armstrong v.*

City of Tampa 106 So.2d 407, 409 (Fla. 1958) Justice Thornal stated:

> . . . the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.

The above statement of the Supreme Court of Florida clearly shows that refusal to apply the doctrine of preemption, or application of the doctrine does not require an actual construing of the supremacy clause of the U.S. Constitution.

It is clear that the order the Petitioner (defendant AFGE) is asking this court to review, is an order rendered by the highest court of the state in which a decision could be had. Robert L. Stern and Eugene Gressman have the following to say about the judgments of intermediate state appellate courts:

> The judgment of an intermediate state appellate court is that of the highest court in which decision can be had if the state law makes its decision final and nonreviewable.

> See Williams v. Florida, 399 U.S. 78, 80, n. 5 (District Court of Appeal of Florida); . . . But if there is discretionary review by a higher state court, the exercise of such discretion must be sought. . . . Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257. Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) pp. 204-206, The Bureau of National Affairs.

Petitioner (defendant AFGE) exhausted all avenues available under the Florida Constitution[1] and the Florida Rules of Appellate Procedure to have the order of the District Court of Appeal of Florida, Third District reviewed by the Supreme Court of Florida, thus, when said court declined to take jurisdiction, the order became an order rendered by the highest court of Florida in which a decision could be had and it is properly before this court under 28 U.S.C. Sec. 1257 (3).

Turning to the issue of federal preemption and the exhaustion of administrative remedies doctrine, Respondent Judge Gale states with reference to the duty of fair representation, "Significantly, the complaint does not allege that DEGRIO is a member of the collective bargaining unit, but merely states that DEGRIO was a member of the union."

Petitioner (defendant AFGE) respectfully requests this court to note that significantly, plaintiff DeGrio, in her amended complaint, did not allege that she was not

[1]Fla. Const. Art. V Sec. 3 (Pocket Part)

a member of the Collective Bargaining Unit, nor did she raise such an issue in resisting the two Motions to Dismiss (C.R. 87-119). It seems elementary that, regardless of petitioner DeGrio's status with reference to the Collective Bargaining Unit, if she alleges to be a member of the union (defendant AFGE), any duty owed to her, necessarily had to flow from the Executive Order which created said union. Absent the Executive Order there would be no union in which plaintiff DeGrio could have been a member. At the very least, the state court was presented with a question of whether or not the Executive Order and the administrative procedures thereunder are applicable to plaintiff DeGrio's cause. In these circumstances the state court must defer to the assistant Secretary of Labor to make the initial determination of whether any duty is owed from petitioner (defendant AFGE) to plaintiff DeGrio and whether an alleged breach of said duty is a proper subject covered by the Administrative Procedures established pursuant to the Executive Order.

Plaintiff DeGrio, as a union member, also had an obligation to allege that she exhausted or attempted to exhaust her administrative remedies pursuant to the union's national constitution (Pertinent parts included in C.R. pp. 40-42, see Articles XIII and XIV). In his brief on jurisdiction, Respondent Judge Gale brushes over very lightly, the doctrine of exhaustion of administrative remedies. The requirement to exhaust administrative remedies is very important to Federal Labor Policy. Without it, courts would be burdened with a heavy volume of direct litigation involving numerous labor relations matters that can, and should be, resolved by administrative agencies. To allow plaintiff DeGrio's

case to proceed in state court would establish a precedent that permits union members to sue a union in common law negligence, without exhausting administrative remedies, anytime the member is disgruntled with the representation afforded by the union. The result would be patently incompatible with the announced policy of the courts in deferring on judicial determination of such member-union disputes until resort to reasonable internal appeal procedures has exhausted the possibility that the matter will be resolved within the family. *Manica v. Chrysler Corp., et al,* 83 LC 10464 (E.D. Mich 1978).

Respondent Judge Gale attempts to justify a direct suit in state court for damages on a Common Law Negligence Theory, on the basis that a similar remedy is not available under the Executive Order (p. 13 of Respondent's brief). Plaintiff DeGrio apparently drew her own conclusion in this regard without ever filing her cause with the assistant Secretary of Labor to determine what remedies were available. It appears from the reasoning in *Garmon,* infra, this court does not support an exception to the preemption doctrine on the basis a state court is able to award compensatory damages where an administrative agency cannot. In *Garmon,* the court stated:

> Even the State's salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

The court went on to hold that to allow a State Court to award damages where an administrative

agency cannot, only accentuates the danger of conflict. In *Lockridge,* infra, this court concluded that "disparities in remedies could produce substantial conflict."

Respondent argues further that simple negligence for violating the tort standard of due care does not amount to a breach of the duty of fair representation. However, this court is respectfully requested to consider a case decided by the sixth circuit, *Ruzicka v. General Motors,* 523 F.2d. 306 (6th Cir. 1975), which has generally been accepted as establishing the principle, that in certain circumstances a union could violate its duty of fair representation when it handles a grievance negligently. *Ruzicka* has been widely cited for its holding on the negligent representation issue.

Respondent Judge Gale cites *Bebensee v. Ross Pierce Electric Corp.,* 253 N.W.2d 633 (S.Ct. Mich. 1977) in support of his argument that even if this cause were characterized as a duty of fair representation case, the state courts have jurisdiction to determine cases concerning violations of the duty of fair representation. In the *Bebensee* case, an employee brought an action charging a common law conspiracy by a former employer and the employee's labor union. The Supreme Court of Michigan cites with approval, *Amalgamated Association of Motor Coach Employees, v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In *Bebensee,* the court said that the employee's charge of common law conspiracy, if true, would constitute a breach of duty of

fair representation and thus, the state court would have jurisdiction under an exception to the doctrine of federal preemption; however, the court went on to hold that the federal preemption doctrine applied in that instance and the state court did not have jurisdiction of the subject matter because the employee failed to specifically present his case on a duty of fair representation theory. The court further stated, "It is the conduct, not the label which determines preemption." In considering whether the alleged tort of common law conspiracy presented an exception to the preemption doctrine, the court held that the complaint failed to satisfy the criteria for state jurisdiction under the "Farmer" test. The court stated:

> Although, in the instant case, as in all others, the state has an interest in protecting workers from discriminatory treatment by a union, such an interest would arguably appear to be adequately protected by the available federal administrative remedies. To the extent that the alleged conduct is not "outrageous" or does not involve violence, Farmer suggests that there is no substantial state interest in providing a forum.

It is patently clear that the allegations in plaintiff DeGrio's complaint fall far short of satisfying the criteria for applying an exception to the preemption doctrine.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner (defendant AFGE's) Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD D. SMITH
Counsel for Petitioner
18th Floor, Home Federal Tower
1720 Harrison Street
Hollywood, Florida 33020
Telephone: (305) 923-6500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February , 1980, pursuant to Supreme Court Rule 33, three copies of the foregoing Petitioner's Reply Brief on Jurisdiction were mailed to George M. Nachwalter, Esquire, Nachwalter, Christie & Falk, P.A., Attorneys for Plaintiff below, Joello DeGrio and Attorneys for Respondent, The Honorable John Gale. A copy was also mailed to the Honorable John Gale, Circuit Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, Dade County Courthouse, Miami, Florida.

HAROLD D. SMITH
Counsel for Petitioner